No. 17-1104

IN THE

Supreme Court of the United States

AIR AND LIQUID SYSTEMS CORP., CBS CORPORATION, AND FOSTER WHEELER LLC,

Petitioners-Defendants,

v.

ROBERTA G. DEVRIES, Administratrix of the Estate of John B. Devries, Deceased, and Widow in her own right,

Respondent.

INGERSOLL RAND COMPANY,

Petitioner-Defendant,

v.

SHIRLEY MCAFEE, Executrix of the Estate of Kenneth McAfee, and Widow in her own right,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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REPLY BRIEF

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(continued from front cover)

QUESTION PRESENTED

Can products-liability defendants be held liable under maritime law for injuries caused by products that they did not make, sell, or distribute?

RULE 29.6 STATEMENT

CBS Corporation is a publicly traded company. National Amusements, Inc. is a privately held company, which beneficially owns directly and indirectly the majority of the voting stock of CBS Corporation. To CBS Corporation's knowledge, no publicly held corporation owns 10% or more of the voting stock of CBS Corporation.

Aside from these changes to CBS Corporation's Rule 29.6 Statement, the Rule 29.6 Statement included with the petitioners' Petition for a Writ of Certiorari remains complete and correct.

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REPLY BRIEF

The petitioners gave three reasons in support of their request for a writ of certiorari. *First*, the Third Circuit's decision below created a circuit split. *Second*, the split arises in the context of maritime law, where uniformity is of the utmost importance. *Finally*, the Third Circuit erred.

The Brief in Opposition fails to refute any of this. Nor does it give any other sound basis for denying review. The Court should therefore grant the petition for a writ of certiorari.

I. THE NEED FOR UNIFORMITY IN MARITIME LAW, AND THE ERRORS IN THE DECISION BELOW, JUSTIFY GRANTING CERTIORARI.

This Court should hear this case for three reasons.

The first reason is that this case implicates an acknowledged circuit split. In the Sixth Circuit, products-liability defendants cannot be held liable under maritime law for injuries caused by products made, sold, and distributed by third parties. *Lindstrom v. A-C Prod. Liab. Tr.*, 424 F.3d 488, 493 (6th Cir. 2005). More specifically, the Sixth Circuit recognizes the "bare-metal rule," under which product manufacturers are not liable for injuries caused by third parties' asbestos and asbestos-containing parts added to their equipment post-sale. *Id.* The Third Circuit, by contrast, rejects the bare-metal rule. In its decision below, it held that manufacturers *are* sometimes liable for injuries caused by third-party components—including asbestos and asbestos-containing parts—used with their equipment post-sale. Pet. App. 15a–16a. In so holding, the court

acknowledged that it was creating a split, rejecting a rule that had "on its side the Sixth Circuit, the only court of appeals to weigh in." Pet. App. 14a.

The second reason to grant the petition for certiorari is the importance of uniformity to maritime law. The Constitution gives federal courts admiralty jurisdiction to assure the "uniformity of rules and decisions in all maritime questions." *DeLovio v. Boit*, 7 F. Cas. 418, 443 (C.C.D. Mass. 1815) (Story, J., riding circuit). Circuit splits such as the one implicated here are thus particularly deserving of a speedy resolution.

Finally, the Third Circuit erred. Admiralty courts develop the general maritime law "in the manner of a common law court." *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 489–90 (2008). Thus, they begin by looking to precedent. When there is no precedent directly on point, they look to the principles that common-law courts have adopted in analogous circumstances, and incorporate those principles to the extent they comport with maritime law.

Application of this approach to this case is straightforward. The traditional rule is that defendants are liable only for the injuries they cause. Pet. 21–24; Restatement (Second) of Torts §§ 4, 315, 316 (1965). This remains "the general rule of American law." *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 393 (1970). That is true even in the products-liability context, which is why products-liability defendants cannot be held liable, under any products-liability theory, for injuries caused by third parties' products added to their equipment post-sale. *See* Pet. 22–24. Given the well-established nature of the traditional rule, it ought to apply under general mar-

itime law so long as it is consistent with that body of law and its purposes.

It is: The rule's predictability advances maritime law's interests in "uniformity," *Foremost Ins. Co. v Richardson*, 457 U.S. 668, 675 (1982), "simplicity and practicality," *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 631 (1959), and the protection of "maritime commerce," *Exxon Corp. v. Cent. Gulf Lines, Inc.*, 500 U.S. 603, 608 (1991); *see also* Pet. 24–25. The rule is also consistent with maritime law's interests in the welfare of seamen, since it leaves them free to sue those whose products caused them harm. Pet. 26. The traditional rule—including the bare-metal rule, which is simply the name given to the traditional rule in the asbestos context—therefore applies in maritime law.

II. ALL THREE COUNTERARGUMENTS IN THE BRIEF IN OPPOSITION FAIL.

Of the three reasons that the petitioners gave for granting certiorari, the respondents—Roberta DeVries and Shirley McAfee—dispute just two. They apparently agree that uniformity is important to maritime law, but they challenge the existence of a split and attempt to defend the Third Circuit's ruling. On top of that, they argue that this case is not ripe for review. None of these arguments is correct.

A. The Third and Sixth Circuits are split as to the question presented.

In their Brief in Opposition, the respondents deny that the Third Circuit's decision below conflicts with the Sixth Circuit's decision in *Lindstrom*. According to them, *Lindstrom* endorsed the bare-metal rule *only* with respect to strict-liability claims. Therefore,

they argue, the Third Circuit did not contradict the Sixth Circuit when it held that defendants can be liable *in negligence* for injuries caused by asbestos and asbestos-containing parts made, sold, and distributed by others, and added to their products post-sale. BIO 7–11.

First, as a matter of fact, *Lindstrom* included claims "for negligence under the Jones Act, the General Admiralty and Maritime law, *and* traditional product liability law." *Lindstrom v. AC Prods. Liab. Tr.*, 264 F. Supp. 2d 583, 586–87 (N.D. Ohio 2003) (internal citations omitted; emphasis added); *accord* First Amended Complaint ¶¶9–19, *Lindstrom*, No. 98-cv-13222, Doc. 232. That is why the Sixth Circuit's opinion in *Lindstrom* explains that "products-liability cases under maritime law may proceed under both negligence and strict liability theories." 424 F.3d at 492.

Second, and more importantly, *Lindstrom*'s holding applies to both strict-liability and negligence theories. "Under either theory," the Sixth Circuit explained, "a plaintiff must establish causation." *Id.* at 492. And the plaintiff in *Lindstrom*, it held, could not. He claimed to have been injured by asbestos from insulation and replacement parts that third parties added to the defendants' equipment post-sale. *Id.* at 494–98. The Sixth Circuit held that insufficient as a matter of law: In an asbestos case, the plaintiff must prove that the defendant made, sold, or distributed the asbestos that caused his injuries, and it will not suffice to show that some third party added the asbestos to the defendant's equipment post-sale. *Id.* In reaching this holding, the Sixth Circuit never distinguished between the plaintiff's

negligence and strict-liability claims. Courts bound by *Lindstrom*—namely, district courts within the Sixth Circuit—thus read the decision as applying to both theories of liability. *See, e.g.*, *Stallings v. Georgia-Pac. Corp.*, 2015 WL 7258518, at *4–*5 (W.D. Ky. Nov. 17, 2015).

Even if *Lindstrom* had purported to address only the plaintiff's strict-liability claims, its holding would still extend to negligence claims, because there is no plausible basis for limiting it to the strict-liability context. *Lindstrom* grounded its holding in tort law's causation requirement. *See* 424 F.3d at 492. Causation, of course, applies to strict-liability and negligence claims alike; "[u]nder either theory, a plaintiff must establish causation." *Id.* So *Lindstrom*'s holding necessarily applies to negligence and strict-liability theories alike.

That is perhaps why the Third Circuit rejected the respondents' argument that *Lindstrom* ought to be read as applying only to strict-liability claims. *See* Joint Opening Br. 16–17, *DeVries v. Buffalo Pumps*, Nos. 16-2602 & 2669 (3d Cir. 2016). Instead, the court below candidly acknowledged the breadth of the Sixth Circuit rule before deciding to part ways with its sister circuit: It described *Lindstrom* as adopting a "bright-line rule," under which manufacturers are "never liable for injuries caused by later-added asbestos-containing materials." Pet. App. 5a. And it recognized that this bright-line rule would "operate in similar fashion in both negligence and strict liability," because it is "rooted in causation" and because causation "cuts across the two types of actions." Pet. App. 7a. Thus, rather than trying to distinguish *Lindstrom*'s "bright-line rule" as inappli-

cable to negligence claims, the Third Circuit acknowledged the rule's breadth and simply rejected it. Pet. App. 14a–15a.

The respondents nonetheless argue that the Third Circuit did not truly part ways with the Sixth Circuit, since it purported to decide the question presented with reference to the negligence tort's "duty" element, while the Sixth Circuit thought of the bare-metal rule in terms of causation. BIO 10–11. But whether the question turns on duty or causation has no bearing on whether there is a split. What matters is that the Third and Sixth Circuits disagree about whether product manufacturers can be held liable for injuries caused by later-added asbestos. *See* Pet. App. 7a. Manufacturers can be held liable for such injuries in the Third Circuit, but not in the Sixth. Thus, the Third Circuit's foreseeability test directly contradicts the Sixth Circuit's bare-metal rule. As a result, two sailors who worked together on the same ship at the same time can sue in two different courts and have their cases analyzed under two different standards.

All of this bears on the respondents' additional charge that the question presented, by referring generally to "products-liability" defendants, blurs the distinction between negligence and strict-liability. BIO 7. That charge assumes the correctness of the Third Circuit's duty-focused analysis: If the bare-metal rule derives from tort law's *causation* requirement, then it applies to both negligence and strict-liability claims. Pet. App. 7a. Since the bare-metal rule *does* derive from the need to prove causation, *see* Pet. 21–26, the question presented applies to negligence and strict-liability claims alike. And even if

this were wrong, it would not change the fact that there is a circuit split regarding the bare-metal rule's application to *negligence* claims.

B. The respondents' defense of the Third Circuit's ruling fails.

The respondents defend the Third Circuit's foreseeability test. BIO 11–16. They never address its inconsistency with the foundational tort principle that defendants are liable *only* for the injuries they cause. *See* Pet. 21–24; Restatement (Second) of Torts §§ 4, 314, 315. And they silently concede that the bare-metal rule, adopted by *Lindstrom*, better promotes maritime law's interests in uniformity, "simplicity and practicality," and "the protection of maritime commerce." *Kermarec*, 358 U.S. at 631; *Exxon Corp.*, 500 U.S. at 608. Nonetheless, they argue, the courts ought to adopt whichever rule best promotes the welfare of seamen, and that the Third Circuit's rule does that by affording them relief in a greater number of cases. This argument fails to reckon with the Third Circuit's flawed methodology, and rests on a premise that this Court has expressly rejected.

1. Admiralty courts do not decipher the rules of maritime law by considering policy interests in the abstract. Instead, they develop rules "in the manner of a common law court," *Exxon Shipping Co.*, 554 U.S. at 489–90, incorporating rules from analogous contexts insofar as they serve the interests of maritime law. As this brief explained above, that approach yields the bare-metal rule.

The Third Circuit did not follow this approach. Instead, it ignored the common law and began its analysis by asking whether the bare-metal rule or a fore-

seeability-based test would best advance the purposes of maritime law. Pet. App. 12a. The Court then decided that the balance weighed in favor of the foreseeability-based test: It determined that the foreseeability-based test did a better job promoting the welfare of seamen, and that both tests did an equally good job promoting maritime law's other interests. Pet. App. 12a–15a.

Even if the Third Circuit could be excused for ignoring the common law, the rest of its argument makes little sense. Whether or not the foreseeability-based approach advances the welfare of seamen, Pet. App. 13a, this Court has held that admiralty courts may not "expand remedies at will simply because it might work to the benefit of seamen and those dependent upon them," *Miles v. Apex Marine Corp.*, 498 U.S. 19, 36 (1990). Equally misguided is the Third Circuit's contention that its approach advances maritime law's other interests just as well as the bare-metal rule. "In products-liability law, where there is a duty to the public generally, foreseeability is an inadequate brake," exposing manufacturers and other commercial actors to "vast" and uncertain liability. *E. River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 874 (1986). The unpredictability of the Third Circuit's test, and the potentially ruinous liability it threatens, undermine maritime law's interests in uniformity, simplicity and practicality, and the protection of maritime commerce. *See id.*

On top of all this, the Third Circuit's foreseeability-based test threatens to impede military readiness. "The ability of government contractors to accurately price the risk of future litigation and liability

is critical to serving two primary goals of federal procurement: protecting the public fisc by getting the best possible price and ensuring an adequate supply of contractors." Brief of *Amicus Curiae* Chamber of Commerce of the United States 9. The traditional rule serves both purposes. The Third Circuit's foreseeability test impairs both purposes. "On a ship most things are connected to other things," *Stark v. Armstrong World Indus., Inc.*, 21 F. App'x 371, 381 (6th Cir. 2001), and so contractors laboring under the Third Circuit's rule must consider the many other products with which theirs will interact when setting prices. *See* Chamber of Commerce Br. 9. In addition to driving up cost, the uncertainty of liability will drive some contractors from the market altogether. To this, respondents have no answer.

2. The respondents make no effort to defend the Third Circuit's conclusion that its foreseeability-test is just as good as the bare-metal rule at promoting maritime law's interests in uniformity, simplicity and practicality, and the protection of maritime commerce. Instead, they argue that the foreseeability test is properly derived from *just one* of maritime law's abstract interests; namely, its interest in the welfare of seamen.

The respondents' argument rests on a premise that this Court has expressly rejected. Again, admiralty courts "are not free to expand remedies at will simply because it might work to the benefit of seamen and those dependent upon them." *Miles*, 498 U.S. at 36. The petitioners addressed *Miles* in their petition, Pet. 30–31, but the Brief in Opposition says nothing about it.

The respondents insist that their seamen-centric approach finds support in *Moragne v. States Marine Lines*, 398 U.S. 375. In fact, *Moragne* followed the proper, common-law style approach outlined above. The case presented the question whether maritime law recognizes wrongful-death claims. To answer the question, *Moragne* looked first to the common law, which historically did not permit wrongful-death actions. 398 U.S. at 379–88. The Court discovered, however, that state legislatures had long-since modified the common law, and that "the allowance of recovery for wrongful death" had become "the general rule of American law." *Id.* at 393. *Moragne* further determined that this "general rule of American law" promoted the interests of maritime law; for example, its "special solicitude" for seamen, *id.* at 387, and its interest in simple, uniform rules, *id.* at 403–04, 405–06. In light of all this, the Court held that maritime law ought to incorporate the general rule, and so held that maritime-law plaintiffs may bring wrongful-death claims. *See id.* at 409.

The Brief in Opposition describes *Moragne* as though the Court simply adopted the rule it thought would be best for seamen. BIO 11–16. But as the foregoing shows, that is wrong: Far from relying exclusively or even primarily on the welfare of seamen, *Moragne* followed precisely the approach for which the petitioners advocate.

The respondents additionally claim support for their exclusive focus on the welfare of seamen from *Atlantic Sounding Co. v. Townsend*, 557 U.S. 404 (2009). That case held that plaintiffs suing for disregard of maintenance and cure "under general maritime law" may seek punitive damages. *Id.* at 424.

The Court followed precisely the same approach as *Moragne*, first considering the common law and maritime law (under which punitive damages were available), before asking whether anything "in maritime law undermines the applicability of this general rule in the maintenance and cure context." *Id.* at 412.

The respondents' claimed support comes from a cropped version of the following sentence: "The laudable quest for uniformity in admiralty does not require the narrowing of available damages to the lowest common denominator approved by Congress for distinct causes of action." *Id.* at 424 (quoted in part at BIO 16). This language hurts the respondents more than it helps them. The Court was explaining Congress's failure to provide for punitive damages under statutory law (the Jones Act) had little relevance to the question whether such damages were available under general maritime law; even statutory law could not justify withholding a remedy that had long been available at common law and admiralty. *Atlantic Sounding*, 557 U.S. at 424. In other words, *Atlantic Sounding* confirms that maritime law is generally best understood as incorporating longstanding common-law rules; for example, the traditional rule that defendants are not liable for injuries they do not cause.

3. This Court should grant review and reverse the Third Circuit.

C. This case is ripe for review.

The Brief in Opposition concludes by arguing that, because the Third Circuit reversed the final judgments entered previously by the District Court, hear-

ing this case would contradict "this Court's policy against piecemeal reviews." BIO 16.

In fact, the posture of this case presents no barrier to review. This Court regularly reviews appellate decisions, like the one below, reversing summary-judgment orders and remanding for further proceedings. *See, e.g.*, *Coventry Health Care of Mo., Inc. v. Nevils*, 137 S. Ct. 1190, 1196 (2017); *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1007–08 (2017). In this case, the question presented involves a purely legal issue on which further proceedings will shed no light. There is nothing that could happen on remand to make this a better vehicle than it already is.

CONCLUSION

The Court should grant the petition for a writ of certiorari in this case.

April 5, 2018

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